IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS

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As we attempted to make clear in our main brief, the underlying issues in this case are (a) whether the Sherman Act was violated by reason of the economic structure of the motion picture industry, which permitted Schine to obtain—in a relatively small number of small cities and towns—the kind of economic position which in the large cities and many of the smaller cities and towns was enjoyed by the distributor-affiliated chains, other "independent" chains and many "independent" theatre operators, *i.e.*, the preferred position as an outlet for the pictures of the principal distributors; and (b) if so, whether the exercise by Schine of its competitive ability to obtain such a position in a number of towns involved Schine in a violation of the anti-trust laws in respect of one or more towns.

The Government's brief does its best to obfuscate these underlying issues.

The most noteworthy feature of the Government's brief is its failure to meet the challenge that we make to the Court's findings, and especially to the findings that Schine "arbitrarily deprived" competitors of product. In our brief (pp. 86-214), we took each and every situation and pointed out that what was involved was the purchase by Schine of pictures in the competitive market; and we showed why the forces of competition favored Schine rather than its competitor. We did not suggest, as the Government says in its brief (p. 72), "that with respect to each of such 16 towns it always developed because of fortuitous circumstances favoring Schine that the distributor determined on the merits of each situation to sell to 'Schine'."

On the contrary, we demonstrated that the "circumstances favoring Schine" were not "fortuitous" but were the natural and normal result of competition within the economic structure created by the distributors' methods of doing business.

The Government disposes of our analysis by a number of sarcastic references and by dumping into the laps of this Court a mass of "town digests" purporting to summarize the evidence with respect to each of 46 towns. The Government has lifted from its brief in the lower Court the 34 "town digests" which appeared in that brief, and has added similar digests for 12 towns for which it did not bother to present digests in the lower Court, for the good and sufficient reason that the evidence respecting those towns was inadequate to make even a colorable presentation. An examination of the digests for those additional towns will show how far the Government has gone to stretch the testimony to make a colorable presentation. The towns in question are Ashland, Athens, Cambridge, Cortland, Delaware,

Easton, Maysville, Middlesboro, Newark, Oneonta, Piqua and Wooster.*

The "town digests" represent the type of advocacy that is often found at the stage of a litigation where the evidence is in and the case is about to be submitted to the judge or jury. It presents the most extreme interpretation of the evidence against the opposite party—a structure in which testimony is superimposed upon assumptions and assertions and inference is piled upon inference.

The "town digests" refer to testimony that the Court relied on as well as testimony that the Court did not rely on, testimony that was contradicted on cross-examination, testimony that was controverted by unimpeachable evidence, testimony which the Court did not believe, hearsay, gossip, assertions, inferences piled on inferences—all pieced together to produce as unfavorable an impression as possible. Apparently the Government—admitting by its silence that many of the findings cannot be sustained—expects this Court to go through these digests, check them against the testimony, and then make new findings to supplant those which the lower Court has made. It is submitted, however, that it is improper for the Government to come into this Court and ask the Court to wade through this type of material.

By submitting the "town digests" to this Court, and by arguing its case without reference to the findings below, the Government is throwing away the Trial Court's findings and in substance and effect is asking this Court to decide the

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*The towns of Cumberland, Oswego, Richmond and Tiffin, though included in the divestiture order, are not included in the "town digests".

case on a new set of findings. It seems hardly necessary to point out to this Court that the orderly disposition of appeals is impossible if the parties before this Court do not make the findings the starting points of their arguments, or if, when findings are attacked, the opposite party refuses to meet the issues thus raised by giving the Court specific references to the evidence that bears on those findings.

Our challenge to each finding was very specific. It would have been easy for the Government to point out, with respect to all or some of the instances cited in the findings, what testimony we had failed to take into account or wherein our attack was insufficient. With particular reference to the Finding, 9(a), that Schine "arbitrarily deprived" competitors of product—and that is the most important of the findings—it would have been simple for the Government to give the Court in each instance the evidence that it thought we had misinterpreted or omitted to take into account. The Court could then decide, with very little trouble, whether we are right in our contention that particular findings are without support in the evidence, or are contrary to the evidence, or are inconsequential or irrelevant, or based upon an erroneous view of the law.

The reason for the Government's failure to answer our specific attacks is that they are not answerable, because the findings below are plainly insufficient. Unwilling to admit that, the Government advances the novel doctrine that the Court's findings "do not purport to summarize all of the relevant evidence, nor are they concerned with the resolution of testimonial conflicts. They reflect merely the Court's view as to the significance in this suit of evidentiary facts which are for the most part beyond dispute by their very nature" (Gov. Br. p. 18).

To admit that findings do not *summarize* all the *relevant* evidence is to admit that they are defective and insufficient. To admit that findings are not "concerned with the resolution of testimonial conflicts" is to admit that the Court has not discharged its judicial function, especially in a case where the Court specifically said that there was "a conflict in the testimony in many of the situations" (R. 3073).

There could be no better proof of the insufficiency of the lower Court's findings, or of the lack of adequate evidence to support them, than the attempt of the Government to offer a new set of findings instead of defending those that were made below.

Government's Theory of the Case

The Government persuaded the Court below that, having found restraints of trade and local "monopolies", it had a broad authority to "reorganize the whole setup of the corporation" to promote and create competition. As explained to this Court in *United States* v. *National Lead Co.*, 332 U. S. 319, Schine was to be divested of assets, the characteristic of which was that the mere possession of them was "a continuing threat to independent competition".

Forced out of that position by the decision in the *National Lead* case, the Government now has great difficulty in phrasing a coherent statement of its latest position. "Buying power" seems to be the objectionable characteristic that the appellants have. But apparently—and in spite of the effort to "blow up" Schine's position in the industry, by figures and by frequent references to its being the "largest independent circuit"*—the mere size of the buying power is not the important thing. When all is said and done, it seems that the vice in the Schine Circuit is its ability to combine closed towns and open towns in the same contract for the licensing of pictures.

So evil is the buying power derived from closed towns, in the eyes of the Government, that a large circuit composed entirely of theatres in one-theatre towns would be certain to run afoul of the Sherman Act in its operations, since its competitive position in each town would be so strong—by reason of control of the other towns—that competitors

*There is no evidence in the record to show that Schine is the "largest independent circuit". The only testimony is that of a distributor witness, who said he thought it was "just about the largest" (R. 2819 but compare R. 3460).

would be discouraged from coming into the town and opening up new theatres. That is the necessary implication of the Government's theory.

Furthermore, an operator with one theatre in a one-theatre town and one theatre in an open town, if he attempted to buy pictures for both at the same time, and used his position in the closed town in bargaining for pictures in the open town, would be committing a violation *per se* of the Sherman Act. That, as we understand it, is the asserted position of Government counsel.

We suggest that the Government is involved in a demonstrable *reductio ad absurdum*.

The Government was admittedly unable to produce a witness who would testify that Schine ever conditioned its willingness to purchase pictures for its "closed" towns upon the willingness of the distributors to sell to Schine to the exclusion of its competitor in the "open" towns. Nevertheless, the Government asks this Court to spell out this type of coercion from the franchise agreements introduced in evidence which the Government says demonstrated this cornerstone of its case without the necessity of proving by the witnesses who negotiated the agreements that the condition was actually imposed.

But, having marked these agreements in evidence, the Government has fallen back on the assertion that its point has been proved without even attempting to demonstrate in a single case that the franchise does what the Government says it does.

As a matter of fact when the agreements are analyzed (see our main brief, pp. 193-206), quite the contrary appears. Every one of the silent witnesses relied upon by the Government to fill the void left by non-existent par-

ticipants in coercive bargaining on the part of Schine, shows very clearly that in no case did the franchise do what the Government claims it did but, on the contrary, that some of the Schine towns, both open and closed, were omitted in every case.

The same observation applies to the so-called master agreements. It should be borne in mind, moreover, that none of the Schine master agreements contained the features of (1) blanket price for the entire circuit and (2) privilege of playing out of order of release which the Government found so objectionable in *United States* v. *Griffith Amusement Co.*, 68 F. Supp. 180.

Just what would happen to the motion picture business throughout the country—which like most other businesses has been built up by individuals and groups who started with small units and were successful in increasing the size and area of their operations—if the Government's theory were to be put into general application, may well be left to the imagination. But it can hardly be doubted that it would not be a very attractive business for the enterprising operator.

Considering the emphasis that the Government puts on closed towns, it is interesting to note that nobody testified that Schine ever made the licensing of closed towns in any instance a condition to the licensing of the same films in open towns, and that the Court made no finding to that effect. All the Court found (R. 3215) was that,

> "By combining the open and closed towns in Schine's deals with the distributors, Schine *was enabled* to dictate terms to the distributors."

This finding means no more than that Schine had the power to do something; but whether the power was ever

exercised, or whether the conditions in the industry were such that it could have been exercised, is a matter on which the Court made no finding.

There were in the record—and they were much relied upon by the Court—numerous quotations from distributors' employees, made to competitors of Schine, that they wanted to sell their pictures to Schine, or considered it good business to sell them to Schine, or even found it necessary as a matter of business to do so, because Schine had a big circuit and they did not want to lose its business.

But those statements never had anything to do with closed towns; and the amount of business that Schine could give a particular distributor depended upon the total number of Schine's theatres and their ability to consume product, rather than on whether the towns where the theatres were located were "closed" or "open".

In this connection, though Schine's rentals of $1,647,000 paid to distributors in a single year are sizeable, it must not be forgotten that the 5 largest independent circuits in the country, presumably including Schine, were found by the Court in *United States* v. *Paramount Pictures,* 66 F. Supp. 323; 70 F. Supp. 53 (F. 126, Paramount R. 3685) to pay less than 5% of the total domestic film rentals of the 8 large distributors; whereas the 5 circuits of the major distributors were found to account for 35% to 45% of such revenues.

The Government asserts again and again, without proof, that the action and policies of the distributors, all of whom operate nation-wide businesses that are enormously larger than Schine's business were controlled in their actions and policies by the dictation of Schine, because of the "strategic" value of closed towns. The Government would have the

Court believe that the closed towns are closed permanently; that competitors may not invade them. But there is nothing in the record to support that contention, and the history of the industry, as developed in the *Paramount* case, is to the contrary. The only condition that has ever "closed" a town to the entry of a new theatre is the existence in the town of adequate theatre capacity, satisfactory appointments and an entertainment policy that satisfies the requirements of the public.

The matter of closed towns has been greatly stressed by Government counsel, far beyond any possible significance that it has in the industry; and as we indicated above, it is submitted that the Government has taken a position which by its own arguments it has reduced to an absurdity.

The term "closed" town is in one sense misleading, for it tends to suggest that a town is isolated from competition. Actually, there is no Schine town which is thus cut off. Many Schine towns are contiguous to opposition towns of equal size; and, though each town may be "closed", there is in such a case keen competition between their respective theatres. That is the precise situation in Gloversville, a Schine town, and adjacent Johnstown, an opposition town. It should also be borne in mind that many Schine towns are near to large population centers. For example, Ballston Spa and Amsterdam are in the "shopping radius", *i.e.*, 10 to 20 miles, of Schenectady; Fairport and East Rochester are a comparable distance from Rochester; Ilion and Herkimer from Utica; Seneca Falls from Auburn; Carthage from Watertown; Corning from Elmira; Lockport from Buffalo; and Mechanicville from Troy.

Argument on Clearances

We take up the arguments of the Government under this head because it is the only subject on which any serious attempt is made to counter our attack on the findings.

But even here the Government simply ignores the actual questions that are here raised, admits in effect that the precise findings are not supported by evidence, and offers this Court a new set of findings; but those have no better support in the evidence than do the findings made below. They afford no support for the judgment and order herein.

The Court found that Schine had obtained clearances from specified distributors of a specified number of days, and that those particular clearances were unreasonable and a major reason for concluding that appellants had violated the Sherman Act. In our main brief we pointed out (a) that those findings were incorrect in many instances as to the number of days clearance granted to Schine; (b) that the Court was apparently unaware that most of the clearances found to be unreasonable were over Schine's own theatres; and, most important of all, (c) that there was not, in any instance, such evidence concerning the factors relevant to the reasonableness of a particular clearance as to justify a finding that such clearance was either reasonable or unreasonable.

The Government has not been able to point out to this Court a single item of evidence to show that any clearance received by Schine was unreasonable, except for (a) opinions expressed in various inadmissible inter-office memoranda of distributors' employees; and (b) certain decisions of the Appeal Board of the Motion Picture Arbitration Tribunal which were *expressly excluded* from the evidence in this case (R. 2561-64).

Clearances over Schine theatres

In answer to our argument that most of the long clearances mentioned in the Court's findings were clearances of one Schine theatre over another, and therefore did not affect competitors, the Government states in its brief (p. 76):

> "In making this argument, appellants overlook the fact that the clearances are an effective means of keeping potential competition out of the towns and that most of the clearances extended over other towns than those in which Schine had theatres."

Here the Government is indulging in two irrelevancies. First, the Court found the clearances unreasonable between first and second-run theatres, and did not find that the clearances were employed to keep other, potential competition out of the town. Second, the findings in question did not relate *in any instance* to clearance of one town over another. Clearance of one town over another is a matter that relates to first runs; it has nothing to do with clearance of the first-run theatre over a second-run theatre in the same town. The Government's answer to our argument on this point is a purely verbal one, the words having no content.

Clearance over distant towns

One of the new findings that the Government is offering to the Court is that Schine obtained clearance in Norwich "over Delhi and Stamford, towns of over 50 road miles away" (Gov. Br. pp. 77-78, f.n. 34). This is supposed to show that Schine obtained an unreasonable clear-

ance for its theatres in a particular town over other towns in the same area. Here the Government ignores the factors that enter into clearance, and ignores the fact (pointed out in our main brief, p. 151) that the Appeal Board of the Motion Picture Arbitration Tribunal found it reasonable for theatres in Wilmington, 66 miles distant from Schine's Plaza Theatre in Milford, Del., to have clearance over that theatre.

All the evidence shows, on the case cited, is that *one* distributor (United Artists) in *one* season (1933-34) granted the clearance that is mentioned. There is no evidence whatsoever concerning the competition between the towns, the distribution of the population, the character of the theatres in any of the three towns involved, or any of the other factors upon which the reasonableness of clearance must be judged.

Here again the Government is simply proposing a new finding, from which it makes the following argument (Br. p. 78):

> "The possession of such clearance gave Schine control over the bookings of the independent as he could only exhibit the film covered by the clearance in accordance with an availability determined by the dates on which Schine chose to play them in its theatre. Such clearance, in effect, surrendered to Schine the booking control normally and properly exercised by the distributor."

At first reading, this statement sounds like an important pronouncement; but if it is analyzed, it will be seen that all it actually says is that a theatre over which clearance is taken cannot play the pictures until the theatre that has the clearance has played them and until the clearance period has ex-

pired. The statement, therefore, is no more than a definition of clearance. It is of universal application throughout the motion picture business.

In citing the awards of the Motion Picture Arbitration Tribunal, which are not in evidence, the Government gives the Court the impression that there has been an adjudication that Schine clearances, as distinguished from other exhibitors' clearances, are unreasonable. In our main brief (pp. 141-42), we pointed out that clearance is the most controversial subject in the motion picture industry, and one that is in constant dispute before the Arbitration Tribunal. We feel justified in following the Government outside the record for the purpose of pointing out that Schine was often on the complaining end of clearance controversies and in 1942-43, was successful in obtaining, through complaints to the Arbitration Tribunal, the following reductions of clearances:

(a) Wilmington over Milford, Delaware, 66 miles away, from 10 days to 7 days;

(b) Utica over Herkimer, New York, 16 miles away, from 7-21 days to 7 days;

(c) Two Shea Circuit theatres in Buffalo over Schine theatres in Buffalo, from 21 days to 3-7 days;

(d) Sandusky over Norwalk, Ohio, 17 miles away, from 7 days to 1 day;

(e) Dayton over Piqua, Ohio, 29 miles away, from 14 days to 7 days; and

(f) Lima over Van Wert, Ohio, 29 miles away, from 14 days to 3 days.

Clearance cumulation.

The Government then goes on at page 78 to develop a theory of public injury by reason of "clearance cumulation", citing 2 cases to support the theory. The first relates to Smalley, a chain operator for a number of theatres in the vicinity of Norwich, N. Y., where Schine had a first-run theatre, with clearance over some of Smalley's towns. The case that the Government puts is one in which Norwich has a clearance over town A, which is in the competitive area of Norwich, but does not have a clearance over town B, which is outside the competitive area of Norwich but within the competitive area of town A. Smalley, on the stand, when asked whether clearance was important in his business, pointed out that in such a situation, if he did not take a clearance over town B for town A, town B would play the pictures ahead of town A—an obvious proposition of universal application in all similar situations throughout the country. To cite this as a case of "clearance cumulation" is thoroughly disingenuous. The Government knows better.

What Smalley testified to with respect to this situation was that he wanted to take clearance over "the other little town the other side of me" (R. 2452-53). It seems obvious that his desire to take clearance over the small towns adjacent to him was not affected one way or the other by the clearance which the Schine theatres had over his theatres.

The same is true of the argument that the Government makes with respect to an incident in December, 1940, when Schine wrote to United Artists, pointing out that a theatre that had opened in the town of Sodus (a town of some 2,000 population, 14 miles from Newark) was playing pictures

ahead of Schine's theatre in Newark and at a lower admission price. United Artists agreed to give Schine clearance for Newark over Sodus, but pointed out that Schine would also have to ask for clearance over Wolcott, since "there is no clearance to and from either of these towns" (Ex. 319, R. 2604, 3846).

The Government derives the following conclusion from the Newark-Sodus-Wolcott situation (Br. p. 79):

> "Thus one restraint begets another, and we find an entire network of restraints on competition all ultimately based upon a clearance taken by Schine in the first instance."

Clearance of Newark over Sodus either was justified or not justified—a matter not dealt with in the findings or in the evidence. The attempt by United Artists to add Wolcott to the clearance was evidently made because this distributor did not want to change the equality that existed between Sodus and Wolcott. There is no evidence that Schine made any request for clearance over Wolcott, either before or after receipt of the letter from United Artists, and there is no evidence that it ever received such clearance from any distributor.

Clearance over towns with no theatres

To support its proposition that it is improper to take clearance over a town having no theatres, the Government cites the instance, referred to in the Court's findings (R. 3221) in which Schine's theatre in Lockport (population about 24,400) had clearance over Mohawk (2,882 population) and Newfane (population 1,134), where the Court

said there were no theatres. The Government also refers to the fact that a Schine theatre in Ilion (approximately 9,000 population) also had clearance over Mohawk. The Government then draws the following conclusion (Br. p. 80):

> "Such clearances, of course, not only have the effect of retarding the construction of theatres in such towns but insure that when a theatre is built it will be subjected to a Schine clearance."

There is not a word in the record to indicate that a reasonable clearance of one town over a smaller town has ever had, or ever could have, the effect of retarding the construction of a theatre in the smaller town. In the cases cited, any theatre operator who constructed a theatre in the smaller town would *expect* to be subject to reasonable clearance in favor of the much larger towns in the same area. He would *expect* Mohawk and Newfane to follow Lockport on the clearance schedule and Mohawk to follow Ilion.

The Government's argument is speculative and theoretical. It has no relation to any *real* issue in the case.

The Government also neglects to mention the important fact that Schine's competitors in the towns in question also received clearances over Newfane and Mohawk. (Ex. 604G, R. 5427, 2532, Ex. 868, R. 5572, 2369.)

Clearance over towns, instead of theatres

Another new theory which the Government advances, as a basis for one of its newly advanced findings, is (Br. p. 80):

> "An outstanding vice of Schine's clearance is that invariably the Circuit has secured from the dis-

> tributors a clearance in favor of a specific theatre of theirs in certain towns not over specified theatres but over other named towns. Such towns are thereby put into a second class category."

This is another one of the "shot in the dark" arguments of the Government, which has no relation to the Court's findings and no support in the evidence. It is the general practice in the industry, where theatres in large towns have clearance over smaller towns, to state the clearance as clearance over the town rather than as clearance over specific theatres (for example, see the following contracts showing Schine theatres subject to clearance in favor of towns rather than specific theatres: Ex. 981 (47), R. 5699, 2547, Ex. 981 (51), R. 5703, 2547, Ex. P-234, R. 5893, 1170, Ex. P-188, R. 5849, 1170, Ex. U-137 (73), R. 4721, 1191, Ex. F-101 (14), R. 5997, 2545). Of course, clearance over a town is in fact clearance only over the first theatre in that town to play the picture (*i.e.*, the first-run theatre) and thus in effect is clearance over a specific theatre.

Of course it can be said that the smaller towns are thereby "put into a second class category", although it would be more accurate to say a "fourth class category" or a "fifth class category", because, commencing with the largest cities of the country, the larger population centers have clearance over nearby smaller population centers, and so on down the line to the towns of the size involved in the instances referred to by the Government.

This particlar argument of the Government is hardly more than shadow boxing; and it can have no purpose except to confuse.

Demand for third-run clearance in Rochester

Again substituting a new finding for those made by the Court below, the Government advances the proposition that "The attainment of unreasonable results in establishing clearance within the Schine towns and in favor of the Schine towns over independent towns was inherent in the methods pursued in negotiating them". For this proposition, the Government cites (Br. p. 82) a certain Warner interoffice memorandum (Ex. 550, 3943, 2836), which reads as follows:

> "Regarding protections—they are set up the same as last year with the exception of the city of Rochester, and Mr. Schine absolutely refuses to take any part of his entire deal, unless we stipulate in his third run contracts that he will follow only Capitol and Temple Theatres, Rochester. This was brought about by the fact that Schine had intended to take over Madison and Monroe Theatres from Fenyvessys, which deal fell thru and there is some talk of Commerford taking over these two houses. Mr. Schine advises that whether or not that deal goes thru, he wants same run as he had last year (3rd run to follow only Capitol and Temple).
>
> "We are waiting your decision so that all contracts can be typed up for final approval."

This interoffice memorandum was written by Warner's Branch Manager to his superior in the Home Office, to justify to the Home Office the proposed deals which the Branch Manager had made with Schine. Appellants objected to the admission of this memorandum for any purpose, and it seems plain that a memorandum written by a Branch Manager to justify his conduct in the eyes of his

superiors should not be taken as proof of the statements of fact made in such memorandum.

But in any event the memorandum, when considered with the contracts that Schine actually made with Warner in the season concerned (1934-35), proves the exact opposite of the Government's contention that Schine dictated clearance terms to the distributors. For while the Warner Branch Manager stated that Schine would not take any part of his "entire deal" (meaning the "deal" for the towns in the area of Warner's Buffalo Branch) unless Warner gave Schine the third-run clearance provisions that it wanted, the fact is that Warner did not give Schine the terms it demanded and that Schine, nevertheless, accepted the Warner contract for Rochester, without the stipulation that the Warner Manager said Schine was insisting on (Ex. W-33 (17), R. 5795-96, 2539).

There are other assertions in the Government's brief—most of them irrelevant to the findings—which we do not answer because they appear to be of too little importance.

On the whole argument of the Government on clearances and related matters—and, in fact, on the whole viewpoint revealed in the Government's brief—the following quotation from the trial court's opinion in the *Griffith* case is relevant, and may be applied to this case by substituting "Schine" for "Griffith" (68 F. Supp. at 88-89):

> "The evidence discloses that the defendants took advantage of the opportunities afforded them in the ordinary course of dealing during the time covered by the complaint. That was their privilege and there was nothing illegal or immoral about it, merely because they represented large interests or were able to make large deals. The evidence shows that the licensing was all arrived at by barter and trade, and the exhibitors all placed upon the same footing.

"The attitude of the Government is one of suspicion. Many of the normal and natural occurrences and situations are given a sinister meaning and argued from that standpoint. The proposition of what 'could be done' or 'might be done' under given situations is argued vigorously. But we are not concerned with that approach. Our concern is what the evidence discloses *was done*, and any fair inferences we can gather from those acts regarding the *intent* of those who acted. A fair indication of this attitude can be gathered from the Government's brief (p. 14) which states:

> 'The ability of the defendant to withdraw from a particular major distributor the entire revenue from its closed towns was of course a major threat it possessed. When this is controlled by one individual negotiating with a distributor its effect is self evident.'

"The evidence fails to disclose that any threat was so made by R. E. Griffith or any other defendant in the negotiations for films, but to the contrary. The suggestion that any distributor on account of that ability was intimidated or compelled to sell films to the defendants is not supported by the evidence. If the mere ability to withdraw all purchases from a distributor in noncompetitive situations, unless the purchaser grants favors in competitive situations, is a threat then all exhibitors possessing two theatres, one in a competitive situation and one in a noncompetitive situation, violate the Sherman Act. Such argument is unsound and falls of its own weight."

The point of view of the Court in the present case was quite different. It accepted the Government's *assertions* of evil motive, and in its hands the evidence assumed a chameleon character. Where the United Artists manager

agreed that Newark should have clearance over Sodus and another nearby town, the Court rejects the opinion of the United Artists manager as to the reasonableness of such an arrangement and holds, without evidence and on the basis of an *assertion* by the Government, that United Artists was under the domination of Schine and that the arrangement was, therefore, unreasonable (F. 25, R. 3224).

On the other hand, whenever the distributor disagreed with Schine, as, for example, when Pielow wrote that he thought particular clearances were unfair (Ex. 430, R. 3912, 2605), his opinion was accepted, and cited by the Court, as evidence that Schine was receiving unreasonable clearances. Thus the evidence works both ways, and Schine is wrong either way.

The record is replete with instances of the chameleon character of the declaration of distributors' employees, when examined by the lower Court under the peculiar microscope furnished by the Government. If the distributor stated a business reason for doing something that suited Schine, the Court simply disbelieved his testimony and it becomes evidence of subterfuge and of under-the-table dealing between the distributor and Schine. But where the distributors' employee indulged in some criticism of Schine, the criticism is accepted as Gospel and elevated *in haec verba* to the dignity of a finding.

Thus, when Wallace (with tongue in cheek, we think) threw out the suggestion to some distributor representatives that he might like to buy second run in Auburn (R. 1969, 1972-75, 2141-42) and was told that the distributors did not think it would be good business to sell second runs in that town, the Court rejected the reason given by the distributor and attributed the refusal to domination and dicta-

tion by Schine—although there was not a scintilla of evidence that Schine was consulted in the matter or even considered.

But when Smith of Warner wrote that if Schine's clearance in Ogdensburg over Canton were reduced, it would "make a better condition for us all"—obviously meaning that *if* Schine would reduce his clearance and pay the same film rental for a less desirable playing position *and if* the independent would pay a higher rental for a playing position closer to Schine, it would be better for Warner —the Court quotes the opinion *in haec verba* as a finding of unreasonable clearance obtained by Schine.

This point of view on the case is one of the reasons why, as we pointed out in our main brief, the Court's findings are literally *riddled* with demonstrable error.

Argument on Divestiture

Alleged failure to comply with Consent Order

In purporting to answer our argument that the divestiture order and the appointment of a trustee are unnecessary, and inappropriate, and that injunctive relief is an adequate means of accomplishing the Government's announced purpose of reducing Schine's "buying power", the Government leans heavily on (1) the proposition of fact that Schine wilfully disobeyed the consent order; and (2) the proposition of law that *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 dealt with and disposed of the very divestiture question here presented.

Both propositions are patently erroneous.

In our main brief we took pains to show that Schine had complied fully with the provisions of the consent order of May 19, 1942, under which it agreed to dispose of its interest in 16 theatres, upon conditions stated in the order. We went so far as to say that the Government's attempt to convey the contrary impression was "an unfair and in fact a vicious attack". Undeterred, the Government in its brief before this Court has seen fit to repeat—*not once but four times*—its effort to prove a point that is flatly contradicted by the terms of the relevant orders of the lower Court.

We emphasize again that the obligation which Schine assumed by the consent order was conditioned upon the provision that it should not be required to sell any property for a price below the amount of its investment. That condition applied not only to Schine's original obligation as set forth in the order (R. 258), but also to the Court's authority

under its reserved jurisdiction to make additional orders (R. 260).

The Government's argument that the consent order required sales of the properties *at all events* was litigated on its motion, made prior to the trial, for the appointment of a trustee to sell the theatres then undisposed of (R. 318-20). The motion was denied and the decision of the Court on this and the several other motions decided at the same time (R. 425-27) not only *did not hold* that the price condition was no longer applicable to the obligation of Schine to sell the theatres, but went further and held that Schine would not necessarily be required to sell at that price (R. 426).

Thus the Court necessarily held that the obligation to sell was not unconditional; and 6 months later the order, as extended, expired by its own terms (R. 256, para. II).

How, on such a state of facts, the Government can seriously maintain before this Court that the obligation of Schine was to sell the theatre interests *at all events*, that the obligation survived the termination of the contract, and that Schine had failed to perform its agreement, we are at a loss to explain. The assertion of these propositions is enough to show the Court the tenacity with which Government counsel hold on to untenable propositions and to cast doubt upon all of their *assertions* on other issues of the case.

We pointed out in our main brief (p. 67) the absurdity of the Government's contention in the light of the fact that in Cumberland, one of the towns named in the divestiture order, the Court allowed Schine to acquire a second theatre, upon a finding that there would be no restraint of competition in Cumberland if Schine had 2 theatres instead of one. The Government's answer to this argument is

typical and deserves close attention. The Government states (Br. p. 9):

> "At the hearing it appeared that Burke, the owner of the Liberty, had complained to the Department of Justice that Schine had persuaded Warner to discriminate against him in Cumberland shortly after Schine acquired the Strand Theatre (R. 334-35), and that the same sort of discrimination occurred with respect to the films of Universal shortly after he had been subpoenaed as a Government witness in 1942 (R. 337)."

It is recommended that the Court read the direct examination of Mr. Burke and his cross-examination by Government counsel, at R. 326-39 and following. It is a good example of the point of view which has made it possible for Government counsel to take such extreme and unreasonable positions in this case.

The Court will note especially the terminology "Schine had persuaded Warner to discriminate against [Burke] in Cumberland shortly after Schine acquired the Strand Theatre" (Gov. Br. p. 9). This is the Government's way of saying that Schine purchased certain top pictures of Warner in the particular year, through contracts made in New York, as a result of which the particular pictures were not available on first run to Burke. The reference to "the same sort of discrimination" with respect to Universal has to do with the fact that in the particular season Universal split its product equally between Schine and Burke.

This is the sort of thing that appears throughout the Government's Appendix A, in almost every pargraph. Instead of stating the evidence, the Government draws its conclusion with the aid of an inference of evil motive, and states the conclusion.

Crescent case

The hodge-podge of sophistries which comprises the Government's argument that the *Crescent* case is authority for the divestiture relief granted in the present case appears to contain the following propositions:

1. Since the Court below knew of the injunctions that it had granted and of those granted in the *Paramount* case, it must have decided that such injunctions would "not afford the necessary relief in this case". (Actually the Court went upon the erroneous theory that "we would have no lawsuit then at all" (R. 3408) if relief were limited to injunctions.)

2. Divestiture in a Sherman Act case is "routine relief".

3. Since there was no finding in the *Crescent* case that the stock interests to be divested had been illegally acquired, Schine's theatres may be ordered sold without proof that they had been illegally acquired.

4. The divestiture order of the lower Court was mild and favorable to the appellants, "less drastic" than the divestiture order of the *Crescent* case, because "the *Crescent* formula of dissolving the unlawful combination by complete separation of the various corporate entities" would have justified a complete breaking up of the Schine structure by separation and sale of all the 100 or more subsidiary companies which held title to or leases of theatres. The Government did not press for its full advantage under the *Crescent* case because "the district court's order deliberately invited" a more or less benign solution of the problem, which the Government calls "limited divestiture". However, the plan adopted "may be open to criticism as inadequate to perform the task traditionally assigned to such plans by the past decisions of this Court".

5. In fact, the *sole* ground on which the Court's plan is open to criticism is its failure to give *positive* assurance of any *substantial diminution* of the appellants' buying power. This is because Schine is given the right to decide which theatres will be sold in the various affected towns—so that the only opportunities that the plan offers to potential purchasers of the theatres to be sold "is a chance to operate an inferior theatre with an inferior policy."

6. The Government's plan was a better plan than the one that the Court adopted, because it also required the sale of theatres in one-theatre towns, which would mean that theatres in the future would "be operated by owners who would be dependent for success upon their skill in theatre operation rather than upon arbitrary control of the major films supplied."

7. The appellants should not be permitted to object to the plan adopted, because the appellants failed to offer a "bona fide plan for dissolving the combination", and the Court therefore was limited to considering the general type of plan offered by the Government. Moreover, appellants did not submit any plan at all until some months after the original judgment was entered.

8. The relief is appropriate because "The violations found were not isolated instances of illegal theatre acquisitions in specific localities. On the contrary, they were based upon a buying power derived from the size of their circuit as well as possession of a number of closed towns, used to obtain maximum competitive advantages in every town in which the circuit operated. * * * Once the Court decided to allow (*sic*) appellants to continue to function as a unit,

it was obviously (*sic*) necessary to approach the problem of restoring the opportunity to compete with the appellants' circuit, as such, by diminishing the power of the circuit as a whole to control the exhibition of films in any town."

9. "Such treatment was particularly appropriate here, since the Court permitted (*sic*) the appellants to retain theatres [unspecified] which would have been divested upon any theory of divestiture as a remedy appropriate to particular theatre situations in which the evidence had shown specific predatory practices."

All of this sophistry is designed merely to obscure the plain distinctions that exist between the *Crescent* case and this one. Here, briefly stated, was the nature of the combination that was dissolved in the *Crescent* case, according to the findings in that case, as they appear in the Record of the *Crescent* case in this Court, pages 1352 to 1473:

1. Those who combined to take joint action were two separately owned corporations and a partnership, together with 10 affiliated companies linked up with one or another of the three principal units by 50% stock ownership* (F. 11-23).

*In the Schine Circuit the partly owned corporations (except in Medina, Fostoria and Syracuse) do not result from any combination between Schine and the local exhibitor. In each case, Schine, not having any theatre in the town, offered to purchase the local theatre or theatres. The local exhibitor in each case found the offer attractive but "hedged" by converting part of his investment into cash and continuing to hold the remainder. The competitive situation in the town remained the same. (In June, 1947, the RKO-Schine pool in Syracuse was dissolved so that Schine now owns 2 first-run theatres outright and competes with RKO and Loew's. This dissolution was approved by Judge Knight.)

2. The 50% affiliates came into being through transactions in which small theatre circuits sold one or more theatres to a member of the combination and were then brought under the umbrella of the combination and protected from competition in the other towns where they operated (F. 24-27).

3. The 13 members of the combination pooled their competition power and launched on a campaign to acquire control of the theatre business in an important geographical region consisting of parts of Tennessee, Kentucky and the several adjacent States (F. 32-37).

4. The group divided territory so that no member had to compete with any other member in any town, and they also refrained from competition in the buying of theatres, so that, although all of them were acquiring or trying to acquire additional theatres, no one of them bid against any other for any theatre (F. 28).

5. When theatres were bought, covenants not to compete were taken from the sellers, not only for the benefit of the buyer but for the benefit of all other members of the combination, and such covenants applied, not only to the particular locality, or to the area in which the particular buyer operated, but to the whole area in which the members of the combination operated (F. 29-30).

7. In their franchises and other contracts for pictures, the combination not only bought the pictures that its members needed, and that they played, but by means of options on second runs they made it impossible, or nearly impossible, for the second run theatres in their territories to obtain pictures on second run until long after the time when the

second run would normally be played (E.g., F. 70, 119; F. 122 at R. 1442-43; F. 123).

On those facts and a number of others along the same line—not a single one of which was found to exist in the present case—the Court held that the creation of the combination—the coming together of the 3 principal units and their 10 affiliates—was for unlawful purposes and therefore in itself unlawful; that "common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective" (323 U. S. at 189); and the further continuation of "common control" was therefore unlawful.

This is a far cry from a plan which proposes to reduce the size of the operations of an independent exhibitor by making him sell one or more theatres in 43 towns, so that competition may be "created" for him in those towns. No such competition, incidentally, was created by the relief granted in the *Crescent* case. The 10 sub-chains there involved did not compete with one another in any town; and when the cross-holdings among the chains were eliminated, they still did not compete with one another in any town.

Practical aspects of divestiture

The Government's experience under the consent order should give it some idea of the practical difficulties involved in the sale of theatres. Schine had paid fairly high prices for the theatres involved in the consent order and, as heretofore pointed out, sales were to be made at no lower than the amount of Schine's investment.

It is apparent from their later attitude on this subject that Government counsel, in framing the consent order, en-

visaged the happy situation in which there would be plenty of buyers and bidders for the theatres in question, at a price equal to Schine's cost.

As it turned out, in only 2 of the 16 cases did the previous operator or previous owner of the theatre want to undo his bargain. When the remaining 14 properties were publicly advertised for sale, there was no rush of bidders; and over the period of time involved there was not more than 1 bona fide offer for any one property; and there were no offers at all for 5 of the properties.

The Schine theatres are located in relatively small communities. There is not any large class of persons in such communities ready to jump at the opportunity to buy or lease and operate a motion picture house.

In arguing the divestiture point in its brief, the Government in a rare moment of illumination explains that some of the theatres that the trustee will sell have been operated only part time or have been closed, or have small seating capacities and not as good facilities as larger theatres which Schine may keep. Then the Government says (Br. p. 52):

> "Thus, the only opportunity that the plan adopted by the court presents to potential purchasers of the theatre sold is a chance to operate an inferior theatre with an inferior policy or no past actual operating policy in competition with superior theatres with an established policy, owned by a powerful circuit which still retains a number of closed (*sic*) one-theatre towns. Whether or not such an opportunity will actually result in the creation of operating competition against Schine in any of these towns is at this moment wholly speculative."

It is safe to assume that potential buyers of the theatres will be no less aware than is the Government of the specula-

tive character of marginal or sub-marginal theatres which the trustee will offer for sale. In a 2-theatre or 3-theatre town, where one theatre is operated only during periods of peak demands for entertainment, a single operator may get a profit (or at least no loss) out of the second or third theatre. But it does not follow (as our main brief shows) that a new operator can come in and get a profit out of the particular theatre. It is not only possible, it is in fact likely —in view of experience under the consent order—that the net effect of the divestiture order would be to sell Schine's properties at sacrifice values, with losses to Schine not compensated for by any public advantage, or by any private advantage except to the speculator who may come in and buy up the properties at auction block values.

Arguments on the Admissibility and Effect of Evidence

In Point IV of its brief, the Government takes issue with the statements of legal principles concerning the admissibility and effect of evidence, as presented in Point II of our main brief. Authorities in support of contrary propositions are asserted, but the Government's authorities do not support its conclusions.

The Government cites the *Crescent* case as one in which inter-office memoranda of the sort here involved were relied on to support the ultimate conclusion of guilt. But this Court, in the first place, did not review the question whether the conclusion of guilt was supported by the evidence because no such error was assigned by the appellants (p. 180), and because, in the second place, this Court declined to rule upon the question whether such proof was admissible, or had been properly admitted against the appellants (p. 184), finding it unnecessary to decide that question.

The Government cites *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, *appeal dismissed*, 249 U. S. 621, as sanctioning the use of inter-office memoranda as proof of "the highest validity". But in that case the Corn Products Refining Company was the principal defendant in the action; the alleged conspiracy was fully proven by independent evidence; the documents in question were prepared by the "officers of the Corn Products Refining Company", and they were received in evidence simply as proof of "the intent, which plays so large a part in" cases of this sort (234 Fed., at p. 978) and not as proof of the supposed facts recited in the memoranda.

With respect to this question of intent, the Government cites *Norwich Transportation Company* v. *Flint,* 13 Wall. 3, and *Greater New York Live Poultry C. of C.* v. *United States,* 47 F. 2d 156 (C. C. A. 2), *cert. den.,* 283 U. S. 837, as holding that statements proving intent are not within the hearsay rule. The exception relating to intent, however, comes into operation *only* if (1) the act, the intent of which is in issue, has been proved, and (2) if an agency relation between the defendant and the maker of the statement has been proved independently, and in the case of such agents (3) if the statement and the act to which it applies are contemporaneous. Moreover, when hearsay is received to prove intent, it cannot be used as proof of the alleged facts recited. The cases which the Government cites generally illustrate the application of those rules.

In *Norwich Transportation Company, supra,* a passenger on board ship had been shot by a member of a detachment of soldiers, and statements by one officer in charge of the detachment, to another, made at the very time of the occurrence, were received in evidence. The action was against the ship-owner for negligence. This Court said that the statements were received as part of the *res gestae* of the accident, and "not * * * for the purpose of proving the facts stated" by the speaker.

In *Greater New York Live Poultry C. of C.* v. *United States, supra,* a conspiracy was proved independently. Contemporaneous statements of proven conspirators were held admissible "to prove the state of mind *of the declarant* if that be in issue, * * *. They are not admissible, however, to prove the truth of the facts recited as explanation of the state of mind of the declarant." 47 F. (2d) at p. 159 (emphasis supplied.).

The general principles applying to this class of evidence are stated in detail in *Vicksburg & Meridian Railr'd* v. *O'Brien*, 119 U. S. 99.* This Court said (pp. 104-105):

> "* * * The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. * * * So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence, 'being,' says Phillips, 'the ultimate fact to be proved, and not an admission of some other fact.' 1 Phil. Ev. 381. * * *"

It then stated the requirement that act and statement be simultaneous as follows:

> "This court had occasion in *Packet Co.* v. *Clough*, 20 Wall. 540, to consider this question. Referring to the rule as stated by Mr. Justice Story in his Treatise on Agency § 134, that 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, *if made at the same time, and constituting part of the res gestae,*' the court, speaking by Mr. Justice Strong, said: 'A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. * * *" (Italics in the original).

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*Cited, appellant's first brief, p. 75.

The same principle was applied by this Court in *Palmer* v. *Hoffman*, 318 U. S. 109. There the Court held, in an accident case, that a written statement made by the engineer of the train involved in the accident two days after the accident might not be received in evidence, and that it was not a statement made in the regular course of business within the meaning of 28 U. S. C. 695, 49 Stat. 1561.

The Government next argues that the documents were properly received because they constituted business records within the protection of 28 U. S. C. 695. Apparently counsel assumes that under that statute any business record of any person may be received in any action, whether or not he is a party to it, and regardless of the number or character of objections which may be raised against it. But the statute had no such purpose, and has no such effect. Its only purpose and effect is to make documents admissible without the strict proof of authenticity which had theretofore been required. *Palmer* v. *Hoffman, supra*, at 111, 112*; *Harper* v. *United States*, 143 F. (2d) 795, 805, 806 (C. C. A. 8); *Massachusetts Bonding & Ins. Co.* v. *Norwich Pharmacal Co.*, 18 F. (2d) 934, 937 (C. C. A. 2nd). But our present objection to this evidence is not directed against the authenticity of those documents as records of the exhibitors. It is, rather, that even if authentic they are inadmissible as hearsay, because not in support of a conspiracy independently proved.

Finally, the Government cites a group of cases involving conspiracies in which, it states, "inter-office communications

* *This Court there points out that the purpose of the sponsors of the Statute was simply to change "The old common-law rule [which] requires that every book entry be identified by the person making it."

of the sort here offered in evidence" were received as proof. In those cases, according to counsel, such communications were "in furtherance of the common object."* *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249. We have no doubt that inter-office communications may be received if in support of a conspiracy, independently proven, and if other legal requirements are met; and that is all that can be gathered from the cases cited.

In our main brief we pointed out that the lower Court, in drawing an inference adverse to Schine because of its failure to call all the "sales managers" of the distributors (R. 3084), had misapplied this Court's decision in *Interstate Circuit* v. *U. S.,* 306 U. S. 208. The Government, in an attempt to explain away this patent error, argues that while in the *Interstate Circuit* case the conspiracy proved "was between the distributors, whose normal contact with each other is through their New York executives", the conspiracies in this (Schine) case "were between Schine and the distributors, whose normal contacts with each other is [*sic*] through a chain of minor executives on both sides * * *."**

Evidently we are not alone in failing to grasp that subtle (and unproved) distinction. The lower Court's opinion speaks not of "minor executives on both sides" but of the "Sales managers for each of the major distributors who had authority to approve film leases", who had been "called by the defendants", and who "gave testimony" for them. He thought that "These sales managers can be only a small number of those employed as such during the period in question", and he cited the *Crescent* case as holding

*Gov. Br., p. 96.
**Gov. Br., p. 97.

(as it did) that "failure to call those *officers* who had authority to act for the distributors" was "persuasive that their testimony, if given, would have been adverse." And he thought that in this case "the defense herein is weakened * * * by failure to call others of the *officers* authorized to act * * *".

Thus the Government's explanation of the lower Court's ruling simply advances the case from the frying pan to the fire, since it is entirely clear that that Court did not do the thing which the Government justifies, and that the Court was quite as wrong under the Government's view as under ours.

The Government's attempted distinction fails to attain its purpose. The basis of the unfavorable inference in the *Interstate Circuit* case was the distributors' failure "to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they acted in pursuance of agreement * * *."* That statement had reference to the fact that the local managers whom the distributors called to testify had no authority to make such agreement as the Government claimed and the proof indicated. So, likewise, the "minor executives on both sides" who the Government suggests should have been called as witnesses had no authority to commit either Schine or the distributors to such an agreement as the lower Court found to exist. Further, J. Myer Schine and the representatives of the distributors who gave testimony "were in a position to know" whether any conspiracy existed in fact. To say that "minor executives on both sides" formed and carried on the conspiracy here alleged without the authorization or knowledge of J. Myer

*306 U. S., at p. 226.

Schine or of the representatives of the distributors who were called as witnesses is tantamount to saying that there was no such conspiracy.

The Government suggests, somewhat diffidently, that in many (but unspecified) instances "these documents contained either instructions to subordinate officials or explanations to superior officials", and that they "were the contemporary tools by which the distributors carried on their activities."*

Even if this statement were true it would meet, at most, only one of the four requirements for admissibility, namely, that the documents in point were verbal acts, admissible in support of a conspiracy if any was proved. It would not meet the basic requirement that such a conspiracy, and the appellants' connection therewith, be proved by independent evidence.

Moreover, one of the errors assigned by the appellants relates to the lower Court's failure to limit the effect of these documents so that they would not be taken as evidence of the statements they contained. It is clear that the Trial Court did accept and use them as such proof. The Government does not claim to the contrary; indeed, it is only as supposed proof of the alleged facts recited that the documents were of any value to the Government, or played any substantial part in the decision or findings. Thus the Government's argument, in this respect, is necessarily that if the documents are admissible as verbal acts in support of a conspiracy they also constitute proof of whatever alleged facts they recite on their face, even though, with respect to such facts, they are inadmissible

*Gov. Br., p. 95.

as hearsay. That has never been the law. They constitute proof "of the nature of original evidence, 'being' * * * 'the ultimate fact to be proved, and not an admission of some other fact.'" *Vicksburg & Meridian Railr'd* v. *O'Brien, supra*, at p. 104.

If any of the 100-odd documents now under consideration can be considered as "instructions to subordinate officials", or as "contemporary tools by which the distributors carried on their activities", they are few and unimportant. The Government fails to specify any of the documents as being of that class. Certainly those referred to in the lower Court's findings and its opinion are not of either sort. Statements such as that "the clearance * * * is unfair"; that Schine "refused to grant * * * shorter clearance"; that a shorter clearance "will make a better condition for us all"; and that "the clearance setup is all wet" (R. 3221-22), are neither tools nor instructions. They are, however, representative of all the documents, and their inclusion, verbatim, in a finding of fact (No. 17) is illustrative of the use which the lower Court made of all of them.

Finally the Government argues that, since "extensive" testimony of higher officials of the distributors "who were remote from the day to day dealings of their companies" [a flat misstatement of fact, as applied to the distributor witnesses] was offered by the appellants, the inter-office records should have been admitted to contradict or qualify that testimony, and would have to be held admissible "under any concept of evidence as a device for ascertaining truth".

But if the documents were not otherwise admissible, they could not be made admissible by reason of the fact that, because they had been erroneously received in evidence,

defendants as a practical matter had to put witnesses on the stand to show what the truth was in connection with the dealings of Schine with the distributors. Evidence that is inadmissible cannot be made admissible merely by the fact that the other party tries to prove the opposite of what such inadmissible evidence might tend to show.

There is no need to grope for a ground for the use of the evidence in question under a "concept of evidence as a device for ascertaining truth", because it would have been perfectly proper for the Government to use the inter-office memorandum of any distributor on the cross-examination of that distributor's witnesses. But the Government did no such thing; and it is strange, indeed, if the written records did in fact contradict or qualify the oral testimony of the distributors' employees, that the Government did not make the slightest use of such memoranda on cross-examination.

Even if such memoranda had been admitted for use on cross-examination, that would not have made them admissible to prove the statements that they contained. Such statements would be proved only if the witness admitted them.

The Government's argument in this respect is simply another effort to do what this Court condemned in *Glasser* v. *United States*, 315 U. S. 60, at 75, namely, to permit hearsay to "lift itself up by its own bootstraps to the level of competent evidence."

The receipt of inter-office communications and their use by the Court as proof of the statements contained in the evidence was clearly error. The arguments made and authorities cited by the Government serve to establish the appellants' construction of the law.

The claim that the error was not substantial is made only in the title of the Government's Point. There is no attempt in the argument to support it. The judgment must be reversed, because such evidence clearly influenced the whole decision of the Court and its entire viewpoint on the relief to be granted.

Conclusion

For the reasons stated herein it is respectfully submitted that the judgment of the Court below should be reversed.

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